STATE OF ILLINOIS

ILLINOIS COMMERCE COMMISSION

LAZ Parking LTD, LLC	)	
	)	
Complainant,	)	
v.	)	
	)	Docket No. 12-0324
Commonwealth Edison Company	)	
	)	
Respondent.	)	
	)	

COMPLAINANT'S RESPONSE TO COMMONWEALTH EDISON COMPANY'S LATE-FILED EXHIBITS TO ITS JUNE 28, 2013 ORAL ARGUMENT

LAZ Parking LTD, LLC ("LAZ Parking") for its Response to Late-Filed Exhibits of Commonwealth Edison Company ("ComEd") to its Oral Argument Heard on June 28, 2013 states as follows:

Oral argument on LAZ Parking's Motion to Deem Certain Facts Admitted Pursuant to Requests for Admission and Responses Thereto (the "Motion to Deem Admitted") was held on June 28, 2013. During oral argument ComEd referred to certain cases and other law, copies of which were served on LAZ Parking on July 11, 2013. These cases and other law are as follows:

Supreme Court Rule 201;

Supreme Court Rule 183;

Administrative Code Section 200.25;

Administrative Code Section 200.350;

Administrative Code Section 200.370;

Supreme Court Rule 137;

Supreme Court Rule 219;

Vision Point of Sale v. Haas, 226 Ill. 2d 334 (2007); and

City of Chicago et al. v. Schorsch Realty Company, Inc., 95 Ill. App. 2d 264 (1968)

The transcript of the oral argument (the "Transcript") on the Motion to Deem Admitted was filed with the Illinois Commerce Commission (the "Commission") on July 15, 2013.

Pursuant to the Administrative Law Judge's Ruling on July 2, 2013, LAZ Parking may respond with written objections or rebuttal to the late-filed exhibits of ComEd, and any written rebuttal regarding the above late-filed exhibits shall be considered incorporated and part of Complainant's rebuttal argument on the Motion to Deem Admitted.

Accordingly, LAZ Parking advises that it does not object to any of ComEd's late-filed exhibits, and respectfully submits the following written rebuttal regarding those exhibits:

I. Vision Point of Sale v. Haas, 226 Ill. 2d 334 (2007) ("Vision Point") and Illinois Supreme Court Rule 183 ("Rule 183").

ComEd's arguments on these matters confirm the point LAZ Parking made during oral argument: ComEd's guiding principle is that if an Illinois Supreme Court Rule or other procedural rule helps ComEd, then it applies in Commission proceedings. If not, well, then, not.

ComEd apparently hasn't noticed the self-contradictory nature of its request for consideration under Rule 183. Recall that the main argument in ComEd's Response to the Motion to Deem Admitted and in this oral argument is that Illinois Supreme Court Rule 216 does not apply in Commission proceedings. (ComEd Response, pages 2, 6, 7, 8, 8-9, 9 note 2, and 11; Transcript, page

96, lines 16-18; page 100, lines 8-9; and page 102, line 2 to page 103, line 16). But, says ComEd, while Rule 216 does not apply in Commission proceedings, Rule 183 does. (Transcript, page 59, lines 7-11; page 74, lines 3-10; page 104, lines 20-21; and page 105, lines 10-17). ComEd cites no authority for its proposition that Rule 216 doesn't apply in Commission proceedings but instead constructs an elaborate argument based solely on the captions of selected Commission rules. At the same time, ComEd simply assumes that Rule 183 does apply, even though the Commission's rules don't mention it. This difference in applicability in Commission proceedings between Rules 216 and 183 arises from ComEd's desire to use the latter to wriggle out of the predicament it created for itself under the former. ComEd thus inadvertently proves the point made earlier by LAZ Parking, namely, that ComEd's guiding principle is that Illinois Supreme Court Rules apply in Commission proceedings only to the extent they do not inconvenience ComEd. (Transcript, page 134, lines 17-19).

Contrary to ComEd's arguments, Rule 183 and Vision Point do not grant a trial court broad discretion to waive or extend deadlines under Rule 216 in order to afford a party who has provided non-compliant responses time to amend them. (Transcript, page 59, lines 7-16). ComEd misstates the holdings of Vision Point and omits any mention of Rule 183's key requirement for an extension of time, namely, "good cause shown."

Vision Point concerned a plaintiff's responses to Rule 216 requests for admission that had two alleged defects. First, the plaintiff did not swear to its denials in the body of its Rule 216 responses, but instead provided a separate Supreme Court Rule 109 sworn verification of those responses. 226 Ill. 2d at 338. Second, although the plaintiff had timely served the defendant with its responses under Rule 216, a local circuit court rule required that the responses also had to be filed

with the court clerk within that 28-day period; this the plaintiff failed to do. 226 Ill. 2d at 339. The plaintiff moved under Rule 183 for additional time to file amended responses, with its "good cause shown" being its reliance on the plain language of Rule 109. 226 Ill. 2d at 339. The trial court at first denied this motion, id., but later reversed itself based not on any circumstance relating to the Rule 216 responses, but rather on the defendant's recalcitrant conduct later on in the case. 226 Ill. 2d at 340. This subsequent reversal by the trial court of its denial of the plaintiff's Rule 183 motion was the specific situation contemplated by the question of law certified to the Illinois Supreme Court. 226 Ill. 2d at 335. On that certified question the court held that in determining whether "good cause" exists for an extension of time under Rule 183, the trial court may not consider facts and circumstances that go beyond the reason for noncompliance. 226 Ill. 2d at 353.

Regarding the plaintiff's supposedly defective responses to requests for admissions, the Illinois Supreme Court held first, that a separate Rule 109 affidavit verifying responses to the requests for admission satisfied the sworn denial requirement of Rule 216. 226 Ill. 2d at 355-56. Second, the court held that the local court rule requiring filing of the responses with the clerk within the 28-day period specified in Rule 216 impermissibly imposed additional requirements on Rule 216 responders. 226 Ill. 2d 358.

ComEd tries to put itself in the shoes of the Vision Point plaintiff, which suffered facts involuntarily admitted under Rule 216 based on what the Illinois Supreme Court considered a technicality, namely, that the plaintiff swore to its denials in a separate Rule 109 affidavit rather than in the body of the response. ComEd's argument fails because in Vision Point the Rule 216 responder did in fact swear to its denials as required by that rule; it just did it in a separate document. ComEd, however, failed to swear to a single one of its denials. Nothing in Vision Point even remotely

suggests that the Illinois Supreme Court would regard a failure to swear to a Rule 216 denial as a mere "technical" mistake warranting consideration of an extension of time under Rule 183.

Nor does Vision Point support ComEd's argument that its mixing of denials and objections in the same response is merely a technical mistake under Rule 216. (Transcript, page 80, line 10 to page 82, line 6). To the contrary, Vision Point supports LAZ Parking's argument because the Illinois Supreme Court stated that "...the plain language of the rule states that the party to whom the requests to admit are directed must serve upon the requesting party either 'a sworn statement' denying the matters of which admission is requested or written objections which need not be sworn." 226 Ill. 2d at 355. That requirement is in the disjunctive, a matter of either/or. ComEd, however, ignored that requirement and combined objections and denials.

Also, by analogy, Vision Point's holding on the local circuit court rule supports LAZ Parking's position, not ComEd's. If a simple court clerk filing requirement is impermissible because it imposes additional burdens on Rule 216 responders, even more objectionable is the elaborate pre-hearing collaborative scheme concocted by ComEd in its Response that imposes far greater burdens on Rule 216 requesters.

LAZ Parking is not arguing technical points here. Failure to swear a denial and combining a denial with an objection are not technical flaws under Rule 216. They are fatal flaws.

Finally, the Vision Point plaintiff made a showing of "good cause" as required by Rule 183 because it reasonably relied on the language of Rule 109. Here, ComEd has failed to show anything even approaching "good cause" as to why it failed to swear to its denials or why it combined denials and objections. ComEd's only excuse, made in its Response, is that it was unfamiliar with Rule 216, that Rule 216 is "fraught with peril" for uninformed and inexperienced litigants (a group that could

hardly include ComEd), that LAZ Parking's requests for admission took ComEd by surprise (though why that surprise lasted a full 28 days is never explained), and even that it was upset by the warning on LAZ Parking's requests. See ComEd Response to Motion to Deem Admitted, pages 7, 10. LAZ Parking explained in its Reply why such poor excuses do not rise to the standard of "good cause" for failure to conform its responses to the requirements of Rule 216, especially when, as here, ComEd was represented by three (3) seasoned and able attorneys. LAZ Parking Reply to ComEd Response to Motion to Deem Admitted, pgs. 10-11.

II. City of Chicago Schools v. Schorsch Realty Company, 95 Ill. App. 2d 264 (1965)

ComEd also refers to Chicago Schools v. Schorsch in support of its argument. Here as well its reliance is misplaced.

In Schorsch, the defendant property owner in a condemnation proceeding (Schorsch) urged on appeal that the trial court had erred in denying its motion to strike the city's responses to its Rule 216 requests to admit on grounds that the city had both answered and objected in the same response. 95 Ill. App. 2d at 279-280. The Illinois Appellate Court agreed with Schorsch that in its Rule 216 responses the city "...should not have been able to both answer and object simultaneously to the same matter," and that Schorsch's motion should have been granted. However, the Illinois Appellate court stated that the trial court's denial of its motion did not amount to reversible error, 95 Ill. App. 2d at 280, adding that Schorsch hadn't been prejudiced. Id.

Schorsch supports the point that LAZ Parking has made throughout this motion, that Rule 216 is an either/or rule, meaning that a responder cannot answer and object or deny and object to the same request for admission. There are two additional points to note on Schorsch.

First, the fact that on appeal this was not regarded as reversible error does not mean that this

tribunal may commit error by ignoring the requirements of Rule 216.

Second, the Schorsch court's views were influenced by the lack of prejudice to the defendant in that case. But the Schorsch court's acceptance of absence of prejudice to the requester as a consideration is no longer good law because Vision Point removes that as a criterion for determining whether to grant a party additional time under Rule 183. Vision Point, 226 Ill. 2d at 350-51. Absence of prejudice to LAZ Parking is a fact or circumstance that goes beyond the reason for noncompliance, and therefore it may not be considered by this tribunal. Vision Point, 226 Ill. 2d at 353. Accordingly, ComEd can't rely on Schorsch to argue that it should be allowed to amend its flawed responses because LAZ Parking allegedly hasn't been prejudiced by them. (Transcript, page 80, line 19 to page 81, line 5; and page 85, line 9 to page 86, line 3).

III. Illinois Supreme Court Rule 201(k)

ComEd's Rule 201(k) argument is nothing more than an objection that LAZ Parking's requests for admission are improper in whole, and as previously explained, under Rule 216 the time for raising such objections expired 28 days after LAZ Parking's requests for admission were served on ComEd.

But even if this objection by ComEd were not time-barred, ComEd's use of this rule again shows how ComEd wants to pick and choose, in its sole discretion, which Supreme Court Rules apply in Commission proceedings, and which are to be consigned to the dustbin. According to ComEd, Rule 216 doesn't apply in Commission proceedings, but Rule 201(k) does.

ComEd argues that rule 201(k) imposes a "meet and confer" requirement before a motion to deem admitted under Rule 216 can be made. (Transcript, page 92, line 2 to page 93, line 7; and page 57, line 18 to page 58, line 4). This makes complete nonsense out of Rule 216. Rule 216 is a

highly precise rule with a specific 28-day response period, as well as an express requirement for prompt motions on objections and other issues. In contrast, Rule 201(k) is a general rule designed to encourage parties to work out differences on discovery matters before bringing motions to compel. LAZ Parking's Motion to Deem Admitted does not concern any difference on discovery. It concerns only ComEd's failure to comply with Rule 216 and the consequences of that failure. Following ComEd's logic would mean that if ComEd failed to respond at all within the 28-day period under Rule 216, LAZ Parking would be required under Rule 201(k) to contact ComEd and offer it a few more days to get out of its predicament before LAZ Parking filed its motion to deem admitted. That is patently absurd. The specific deadlines of Rule 216 control over the general exhortation of Rule 201(k).

In addition, it is outrageous that ComEd now embraces Rule 201(k) given how completely it ignored LAZ Parking's earlier repeated requests to meet and confer on discovery issues. (See exhibits to LAZ Parking's Reply on Motion to Deem Admitted). ComEd had no interest whatsoever in conferring with LAZ Parking until the Motion to Deem Admitted was filed. Only after that did it wake up to find itself with a self-inflicted procedural wound.

IV. Illinois Commerce Commission Rule 200.350

For the reasons previously discussed, this argument is likewise time-barred because it amounts to an objection that LAZ Parking's requests for admission are improper in whole, and ComEd failed to raise this objection within the 28-day period specified in Rule 216.

Even if this argument were not time-barred, Rule 200.350 is irrelevant to this motion. LAZ Parking filed a motion to deem admitted under Rule 216. Rule 216 does not call for any judicial supervision. There is no compulsion in Rule 216. ComEd could have ignored LAZ Parking's

requests for admissions if it pleased. But ComEd answered the requests for admissions without any need for compulsion or supervision. ComEd's raising of a supposed Rule 200.350 issue is just another in a series of straws that ComEd is trying desperately to grasp to evade the consequences of its failure to conform its responses to the requirements of Rule 216.

V. Illinois Commerce Commission Rule 200.370

ComEd's objection under this rule is also time-barred because it is an objection that LAZ Parking's requests are improper in whole, and ComEd failed to raise this objection within the 28-day period provided for in Rule 216.

But even if it were not time-barred, Rule 200.370 is likewise irrelevant to this motion; LAZ Parking has not requested supervision of discovery by the Administrative Law Judge.

VI. Illinois Commerce Commission Rule 200.25

ComEd's objection under this rule is also time-barred because it is an objection that LAZ Parking's requests are improper in whole, and ComEd failed to raise this objection within the 28-day period provided for in Rule 216.

But even if it were not time-barred, this rule provides in part that "parties which do not act diligently and in good faith shall be treated in such manner as to negate any prejudice or disadvantage experienced by other parties."

ComEd has made a great deal of noise about whether LAZ Parking has acted in good faith. (E.g., Transcript, pg. 54, lines 12-16; pg. 82, lines 13-16; pg. 94, lines 11-17; and pg. 99, lines 2-9). Yet ComEd bases these allegations on nothing but the requests for admission and the Motion to Deem Admitted themselves.

ComEd has been brought to this point not by any lack of good faith on the Part of LAZ

Parking, but rather by its own attitude towards discovery in this case. Its failure to swear to its denials on the requests for admission is simply representative of that attitude.

There has been no unfairness here. The instructions on complying with Rule 216 were set out on the very first page of LAZ Parking's requests for admissions, including the boldfaced warning language required by Rule 216(g). ComEd can't say that it didn't read these because in its Response it claims to have been upset or frightened by this required warning. Nothing in Rule 200.25 affects the consequences of ComEd's failure to conform its responses to Rule 216.

VII. Rule 137 and Rule 219(b)

ComEd's spurious claims about LAZ Parking's alleged bad faith in issuing the requests for admission amount to nothing more than an objection that the requests for admission were improper in whole, which objection is time-barred because ComEd failed to raise it within the 28-day period provided for in Rule 216.

But even if this argument by ComEd were not time-barred, it shows once again the fundamental incoherence of ComEd's position: On one hand, ComEd would ordain the applicability of Supreme Court Rules 137 and 219 in Commission proceedings, while on the other it would banish Rule 216. See Section I, above. Why this radical difference between parts of the same set of Illinois Supreme Court Rules? The answer lies in ComEd's highly selective application of those rules, and ComEd's selectivity makes sense only when viewed through its own self-serving lens. ComEd's own argument again confirms that its fundamental principle is that Illinois Supreme Court Rules apply in Commission proceedings only to the extent they do not inconvenience ComEd.

ComEd makes nothing more than conclusory allegations that LAZ Parking acted in bad faith by making fifteen requests for admission that all relate to metering and billing matters that lie at the

heart of this case. Yet ComEd offers no explanation of how it arrives at this remarkable conclusion despite Exhibits A through E to the Complaint, nor how it failed to recognize this alleged bad faith until after the Motion to Deem Admitted was filed. The Complaint and its exhibits illustrate the truly breathtaking absurdity of ComEd's argument under these two rules.

Respectfully submitted this 26th day of July, 2013

LAZ PARKING LTD, LLC,

By: /s/ ***Paul G. Neilan***

Paul G. Neilan
Its Attorney
Law Offices of Paul G. Neilan, P.C.
33 North LaSalle Street
Suite 3400
Chicago, IL 60602-2667
312.580.5483 Tel.
312.674.7350 Fax
pgneilan@energy.law.pro